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Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D. C. 20554

MAY - 6 1993

FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

In re Applications of) MM No. 93-41
)
TRIAD FAMILY NETWORK, INC.) BPED-910227MD
Winston-Salem, North Carolina)
Channel 207C3)
)
POSITIVE ALTERNATIVE RADIO, INC.)	BPED-911119MC
Asheboro, North Carolina)
Channel 207A)
)
For Construction Permit for a)
New Noncommercial Educational)
FM Station)

TO: Administrative Law Judge
Joseph P. Gonzalez

**REPLY TO OPPOSITION TO PETITION TO DISMISS
TRIAD FAMILY NETWORK, INC. APPLICATION**

Positive Alternative Radio, Inc. ("Radio"), filed April 6, 1993, a Petition to Dismiss the application of Triad Family Network, Inc. ("Triad") for failure to comply with specific Commission rules, more particularly §1.325 relating to integration statements and standardized integration statements that "must. . .be provided by all applicants". Triad failed to comply with the said rule and opposed Radio's Motion, now claiming that compliance with Commission regulations is unnecessary. Radio, through its counsel, now replies to the Opposition of Triad.



1. Triad has taken the position that it need not comply with the specific direction of §1.325, although it has produced no evidence or authority from the Presiding Judge that it may evade Commission rules. Indeed, Triad has in effect arrogated unto itself a determination as to whether it will comply with or ignore the clear and specific language of §1.325. In an attempt to support its Opposition, Triad contends that "virtually every FCC administrative law judge has found [§1.325] to be nugatory" but has substantiated its wishful thinking only by an Order Prior to Prehearing Conference, released by ALJ Steinberg in MM Docket No. 92-116. The other examples contained in Triad's Opposition, from Judges Gonzalez, Sippel and Miller, make no mention of the inapplicability of §1.325 or a waiver of it.¹ Incredibly, Triad also cites as authority a Notice of Appearance filed by counsel in MM Docket No. 93-52 and a statement of counsel in MM Docket No. 91-157 (on the date that the applicable portions of §1.325 became effective) that he would not serve the standard document production order and the standardized integration statement "with this filing". The declination of counsel to comply with a Commission rule is hardly authority for its inapplicability. Nor can rulings of administrative law judges relating to document production serve as evidence that standardized integration statements and document production orders need not be exchanged, since §1.325(3) relates to

¹ Surely, one Order of an ALJ and three "interpretations" of §1.325 cannot be construed as "virtually every FCC administrative law judge".

Supplemental Document Production which concerns documents not previously exchanged pursuant to the Standard Document Production Order.

2. Triad had sought to avoid exchange as required by the rules by notifying the Presiding Judge by hand delivery of a letter dated April 2, 1993 that it would not comply with §1.325(c)(1) and (2). A copy was not hand delivered to counsel for Radio who received it Monday, April 5, 1993, the due date for exchange of the required Standardized Integration Statement and Document Production. Nor was counsel afforded the courtesy of a telephone call to the effect that Triad would not comply with the rules. Thus "sandbagged", Radio duly exchanged the said material and tendered a copy of its Standardized Integration Statement to the Presiding Judge. If, as Triad now piously claims, it was acting in full good faith, why did it not hand delivery a copy of its April 2 letter to Radio or at least communicate by telephone?

3. Triad urges that the Presiding Judge not accept Radio's "interpretation" of §1.325. This is a misnomer; Radio has not "interpreted" §1.325: its language is clear and explicit: applicants must exchange the said documents and a failure to do so will result in dismissal of an application. The rule makes no exception for non-commercial applications or any other class of application. Whether an administrative judge can waive such a clear and explicit regulation is debatable; whether he can waive it retroactively is yet another matter. Until and unless the Commission, by a rule making proceeding, excuses non-commercial applicants from compliance with §1.325, an

applicant is obligated to comply with its provisions or suffer the consequences of dismissal.

4. The contention of Triad that matters contained in the Standardized Integration Statement and Document Production Order are "meaningless" is not borne out by an analysis of what must be exchanged. Subsection (i) of §1.325(1) Standard Document Production Order provides for the exchange of:

All formation and organizational documents, including articles of incorporation, by-laws, partnership agreements, voting rights, proxies, and any amendments to the foregoing documents.

Likewise, subsection (xii) requires exchange of:

All documents that identify or describe the principals who are responsible for completing the application, arranging financing, obtaining the applicant's transmitter site, publishing the required notices, establishing the local public inspection file, and retaining the lawyers, engineers, and other professionals.

If such documents are indeed "meaningless", then parties will be precluded from subsequently requesting them or from deposition questions relating thereto.

5. The cases cited by Triad in support of its contention that it need not comply with §1.325, Real Life Educational Foundation of Baton Rouge, Inc., 6 FCC Rcd 259 (1991); Seattle Public Schools, 4 FCC Rcd 625 (Rev. Bd. 1979) and New York University, 10 RR 2d 215 (1967) were all decided prior to the adoption of §1.325(c) and its effective date of July 1, 1991. Apparently no binding authority exists for Triad's contention that §1.325 is inapplicable to non-commercial stations. Indeed, the three cited cases point out that commercial applications differ from those for non-

commercial facilities but none stands for the inapplicability of §1.325(c) to non-commercial applicants.

6. As Radio requested in its Petition, the Presiding Judge should dismiss the Triad application for failure to comply with §1.325; alternatively, he may wish to certify this question to the Commission in order to receive a binding opinion as to its applicability to non-commercial applications.²

Respectfully submitted,

POSITIVE ALTERNATIVE RADIO, INC.

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May 6, 1993

² Triad's reference to Radio's Petition as "procedural game-playing" evokes the observation that if patriotism is the last refuge of the scoundrel, name-calling may be the last refuge of the legally bankrupt.

CERTIFICATE OF SERVICE

I, Margaret A. Ford, Office Manager of the law firm of Booth, Freret & Imlay, do hereby certify that copies of the foregoing REPLY TO OPPOSITION TO PETITION TO DISMISS TRIAD FAMILY NETWORK, INC. APPLICATION were mailed this 6th day of April, 1993, to the offices of the following:

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